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No. 06-368

In the Supreme Court of the United States

DAVIDSON MOMAH, PETITIONER

v.

CARI M. DOMINGUEZ, CHAIR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court should vacate the judgment and remand the case for reconsideration in light of *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006).

2. Whether a federal employee's allegation that his employing agency's equal employment opportunity office did not properly investigate his discrimination complaints precludes the district court from granting summary judgment in favor of the agency in his ensuing Title VII suit.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 9
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Burlington N. & Santa Fe Ry. v. *White*, 126 S. Ct. 2405 (2006) 9
Jordan v. *Summers*, 205 F.3d 337 (7th Cir. 2000) 11
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 8
Smith v. *Casellas*, 119 F.3d 33 (D.C. Cir. 1997) 10

Statutes:

Rehabilitation Act of 1973, 29 U.S.C. 791 7
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 7, 9, 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-25a) is not published in the *Federal Reporter* but is reprinted in 175 Fed. Appx. 11. The orders of the district court granting respondent's motion for summary judgment (Pet. App. 28a) and denying petitioner's motion for reconsideration (Pet. App. 26a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2006. A petition for rehearing was denied on April 17, 2006 (Pet. App. 1a). On July 7, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including September 14,

2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a black native of Nigeria who emigrated to the United States in 1980. Pet. App. 3a. After graduating from law school, he began work in April 1994 as an investigator in the Detroit, Michigan office of the Equal Employment Opportunity Commission (EEOC). *Ibid.* In 1997, petitioner applied for and received a position as an administrative judge in the EEOC's Memphis, Tennessee office. *Ibid.* Shortly following his move to Memphis, petitioner was hospitalized after a white supremacist assaulted him at a gas station. *Ibid.* Petitioner had originally planned for his wife and daughter to join him in Memphis, but as a result of the attack, his wife refused to move to Memphis and insisted that he transfer back to Detroit. *Id.* at 3a-4a. Petitioner ultimately decided to seek a hardship transfer when his daughter began experiencing health problems. *Id.* at 4a.

In a letter dated February 3, 1998, EEOC headquarters denied petitioner's hardship transfer request. Pet. App. 4a. After consulting with the director of the Memphis office, the reviewing EEOC official had determined that the needs of that office were too great at that time for petitioner to leave. *Ibid.* The letter stated that the EEOC would "be happy to reconsider [petitioner's] transfer request" if the workload and staffing of the Memphis office were to change. *Ibid.* The Memphis director met with petitioner and explained that due to the office's backlog, petitioner's continued presence would be necessary for at least six months. *Id.* at 4a-5a.

After six months, petitioner met again with the Memphis director. Pet. App. 5a. The condition of petitioner's daughter had worsened, as she had been diagnosed with scoliosis. *Ibid.* Petitioner expressed his willingness to accept any position in Detroit, including as a temporary administrative judge or even as an investigator. *Ibid.* He also offered to pay his own moving expenses. *Ibid.* The Memphis director told him that his transfer request would not be approved, but that he should go ahead and contact headquarters about it. *Ibid.*

Petitioner submitted the second transfer request to EEOC headquarters, and also traveled to EEOC headquarters to discuss his concerns with officials there. *Id* at 5a-6a. They informed him that the low workload in Detroit prevented a transfer there, but suggested that he consider a transfer to Indianapolis, which would bring him closer to Detroit than his current Memphis posting. *Ibid.*

On September 8, 1998, the agency formally denied petitioner's second request for a transfer to Detroit. Pet. App. 6a. In making this decision, headquarters had consulted with the Detroit field office. *Id.* at 6a-7a. That office reportedly did not want petitioner back, due to problems during his previous posting there. *Id.* at 7a. The Detroit office had held a meeting about petitioner's possible transfer. *Id.* at 5a. The deputy director of the office, a black male, had expressed no difficulties with petitioner returning, but the enforcement manager, a white female, had objected. *Id.* at 5a-6a. Petitioner claims that the enforcement manager and another white female, an administrative judge, had put pressure on the director of the Detroit office to convince headquarters to deny the transfer. *Id.* at 6a. The director of the Detroit office, however, stated to petitioner that he had played

no role in the denial of his transfer other than reporting to headquarters about the workload in the Detroit office. *Id.* at 7a.

Petitioner sought reconsideration of the denial from the headquarters officials, who again informed him that petitioner would not be granted a transfer to Detroit. Pet. App. 7a. Petitioner began to complain to the Memphis director that he was receiving discriminatory treatment. *Ibid.* In September 1999, roughly a year after his second transfer request had been denied, petitioner learned that a white investigator, who had previously moved from Detroit to Albuquerque, had received a transfer back to Detroit for family reasons, despite a history of performance problems. *Id.* at 7a-8a. Petitioner subsequently renewed his request for a transfer, asking headquarters officials and the director of the Detroit office about vacancies and the workload in Detroit. *Id.* at 8a. The officials informed him that the situation had not changed, and continued to deny his transfer request. *Ibid.*

In October 1999, petitioner contacted an EEO counselor, alleging that the transfer denials were discriminatory. Pet. App. 8a. On November 24, 1999, he filed a formal EEO complaint, claiming that the agency discriminated against him on the basis of race, color, national origin, gender, and disability, and had retaliated against him for the exercise of protected rights. *Ibid.* He specifically alleged that the agency had discriminatory and/or retaliatory reasons for denying his transfer requests, revoking an offer to transfer him to an administrative judge position in Indianapolis, rating him as "proficient" rather than "outstanding" in a November 1998 performance review, delaying his promotion from GS 12 to GS 13 from December 1998 to February 1999,

and delaying his promotion from GS 12 to GS 13 from December 1999 to January 2000. *Id.* at 8a-9a.

In a letter dated May 26, 2000, the EEO office notified petitioner that it would accept for investigation only his claim regarding transfer requests (which it treated as a continuing violation) and his claim regarding the most recent promotion, finding the remainder to be untimely. Pet. App. 9a. During the investigation of those claims, petitioner learned that during the time his transfer requests were pending, the agency had granted requests from several white females relating to employment in the Detroit office, including rehiring one as a contract employee performing budget analysis, allowing another to transfer from New York as an investigator while she attended law school in Ohio, and temporarily shifting a third from an attorney position to an interim position as a non-permanent administrative judge. *Ibid.*

In April 2000, the agency offered petitioner a transfer to Indianapolis, which he accepted. Pet. App. 9a. Petitioner claims that he accepted the transfer because agency officials had promised him a transfer to Detroit as soon as a position became available there. *Id.* at 10a. He further claims that his time in Indianapolis was difficult, as there was tension with his supervisors regarding his use of personal time for visits to his family in Detroit. *Ibid.*

Petitioner sent another letter to EEOC headquarters on May 25, 2000, again requesting a hardship transfer to Detroit. Pet. App. 10a. He and his attorney went to EEOC headquarters to discuss this latest request in person; EEOC informed him that a transfer would be impossible, due to the Detroit office's budgetary constraints and lack of a vacancy. *Ibid.* The EEOC also responded negatively to oral inquiries regarding a

transfer to Cleveland or back to Memphis, stating that the former office was overstaffed and the latter lacked a sufficient budget. *Ibid.* On June 27, 2000, petitioner's most recent request for a transfer to Detroit was formally denied on the ground that no funded vacancies existed in that office. *Ibid.* Petitioner shortly thereafter requested reconsideration and submitted yet another transfer request; in a letter dated August 24, 2000, the EEOC informed petitioner that Detroit's vacancy situation had not changed. *Ibid.* Petitioner then took a medical leave of absence for depression and work-related stress from September 2000 to April 2001. *Id.* at 11a.

Soon after petitioner returned, the EEOC received permanent funding for a permanent administrative judge position in the Detroit office. Pet. App. 11a. Petitioner applied for the position and was considered along with other applicants, but the EEOC eventually selected the candidate who had been filling the role on a temporary basis. *Ibid.* In October 2001, petitioner received and initially accepted a transfer back to Memphis as an administrative judge. *Ibid.* However, a dispute ensued as to who would bear his relocation costs and when he would have to report for duty, and petitioner ultimately declined the transfer. *Ibid.*

On June 4, 2002, the EEOC issued it final action on its investigation into petitioner's complaint. Pet. App. 11a. It affirmed the finding that several of his claims were untimely, and found no merit to his claims that, due to discrimination in and retaliation for protected activity, (1) his hardship transfer requests to Detroit had been denied, and (2) his promotion had been delayed. *Id.* at 11a-12a. It concluded that petitioner had not established that other similarly situated individuals had been treated more favorably or that any relevant

decisionmaker knew of any protected activity in which he had engaged. *Id.* at 12a. It further concluded that petitioner had in fact received a promotion on the first day possible and that he had failed to show that the agency's reason for denying his transfer requests (the lack of available positions in Detroit) was pretextual. *Ibid.*

2. On August 30, 2002, petitioner filed suit against the EEOC in federal court, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. 791, and various other federal and state laws and regulations. Pet. App. 12a. The district court granted the EEOC's motion to dismiss as to all but the Title VII and Rehabilitation Act claims. *Id.* at 12a-13a.

The court subsequently granted summary judgment in favor of the EEOC on the remaining claims. Pet. App. 28a, 43a-46a. It agreed that petitioner had not made a timely EEO complaint with respect to certain claims, and determined that petitioner had presented insufficient evidence to support his various theories of discrimination and retaliation. *Id.* at 43a-46a. The court concluded that the transfer denials were not discriminatory, because (a) an administrative judge position had not existed in Detroit at the time petitioner sought it, (b) the EEOC had legitimate reasons for denying his request to transfer to an investigator position, and (c) petitioner had failed to show that similarly situated persons had been treated more favorably. *Id.* at 44a. The court also concluded that the EEOC had not denied the transfer requests in retaliation for the filing of petitioner's EEO complaint, because petitioner had failed to establish any causal connection between the two events. *Id.* at 45a-46a. The court furthermore determined that peti-

tioner "failed to raise any question of fact" that the agency had obstructed the processing of his EEO complaint and noted that "the undisputed facts suggest that it is not so." *Id.* at 45a. The court denied petitioner's request for reconsideration. *Id.* at 26a-27a.

3. The court of appeals affirmed. Pet. App. 1a-25a. The court held that the EEOC had waived its timeliness defense as to petitioner's Title VII claim that the agency had discriminated against him by failing to grant his transfer requests, *id.* at 14a, but proceeded to conclude that he had presented insufficient evidence to support it. It determined that petitioner had "failed to present direct evidence of discrimination," *id.* at 17a, and that he also could not make out a prima facie case of discrimination under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *id.* at 22a. The court concluded that denial of hardship transfers could not amount to actionable "adverse employment action[s]" for purposes of a Title VII discrimination claim. *Id.* at 19a.

The court likewise affirmed the district court's grant of summary judgment on petitioner's retaliation claims. Pet. App. 22a-23a. It rejected his claim that the agency had retaliated against him by denying his transfer requests, reasoning that "the denial of a purely lateral transfer without more is insufficient to constitute an 'adverse employment action' under Title VII." *Id.* at 23a. And it concluded that "no separate cause of action" existed for petitioner's allegation that the EEOC had retaliated against him by failing to properly process his EEO complaint. *Ibid.*

ARUGMENT

1. Petitioner contends (Pet. 14) that the court of appeals rejected his retaliation claim based on reasoning that conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *White*, 126 S. Ct. 2405 (2006). In *Burlington Northern*, this Court held that Title VII's anti-retaliation prohibition is not limited to employment actions that affect the terms and conditions of employment. 126 S. Ct. at 2412-2413. Rather, the anti-retaliation prohibition extends to any action that a "reasonable employee would have found" to be "materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (internal quotation marks and citation omitted). Under that standard, "the significance of any given act of retaliation will often depend upon the particular circumstances." *Ibid.*

In rejecting petitioner's claim that the denial of his requests for a hardship transfer constituted retaliation for protected Title VII activity, the court of appeals considered whether the denial of petitioner's transfer requests would be objectively "adverse to a reasonable person," and concluded that it would not under the circumstances of this case. Pet. App. 21a. The court did not, however, frame this objective, "reasonable person" inquiry in the same manner as the Court in *Burlington Northern*. That is, the court of appeals did not consider whether the denial of petitioner's transfer requests would "have dissuaded a reasonable worker from making or supporting a charge of discrimination." 126 S. Ct. at 2415 (quotation marks and citation omitted). Accordingly, a remand is warranted to permit the court of ap-

peals to apply the *Burlington Northern* standard. The court of appeals' judgment should therefore be vacated and the case should be remanded for reconsideration of whether denying petitioner's requests for a hardship transfer constituted a materially adverse action under the *Burlington Northern* standard.

2. Petitioner next contends (Pet. 23-24) that summary judgment in favor of the EEOC is per se improper because the EEOC allegedly did not conduct a proper investigation of his EEO complaint. That contention is without merit and does not warrant review.

As a threshold matter, the district court found that petitioner had "failed to raise any question of fact supporting" his contention that the agency obstructed processing of his EEO complaint, and "the undisputed facts suggest[ed] that it [was] not so." Pet. App. 45a. That finding is sufficient to dispose of petitioner's failure-to-investigate claim.

In any event, there is no merit to petitioner's contention that an agency's failure to investigate precludes a grant of summary judgment on issues that were not investigated. That contention necessarily rests on the view that Title VII creates a cause of action that allows a federal employee to seek relief based on the EEOC's failure to investigate a charge of discrimination. As the courts of appeals have recognized, however, Congress has not authorized a cause of action against the EEOC "for the EEOC's alleged negligence or other malfeasance in processing an employment discrimination charge." *Smith* v. *Casellas*, 119 F.3d 33, 34 (D.C. Cir. 1997) (per curiam) (citing cases from other circuits). Nor does Title VII grant a federal employee "an implied failure-to-process cause of action" when a federal employer allegedly fails to properly investigate his claim of

discrimination. *Jordan* v. *Summers*, 205 F.3d 337, 342 (7th Cir. 2000). There is therefore no legal basis for petitioner's failure-to-investigate claim.

Petitioner also contends (Pet. 24-30) that the lower courts improperly evaluated the evidence in granting summary judgment to the EEOC on claims that allegedly were not investigated. Pet. 24-30. That fact-bound question does not warrant review.

CONCLUSION

With respect to question one, the judgment should be vacated and the case should be remanded for reconsideration in light of *Burlington Northern*. With respect to question two, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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